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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ESTATE OF EBONY H. et al., Plaintiffs and Respondents, v. CLARA DEE THIESMEYER, as Successor Trustee, etc., et al., Defendants and Appellants.	B235467 (Los Angeles County Super. Ct. No. GC045031)

APPEAL from an order of the Superior Court of Los Angeles County. C. Edward Simpson, Judge. Reversed.

Mark R. Weiner & Associates, and Kathryn Albarian for Defendants and Appellants.

Law Offices of Akudinobi & Ikonte, Emmanuel C. Akudinobi and Chijioke O. Ikonte Plaintiffs and Respondents.

The trial court entered summary judgment in favor of certain defendants, then granted plaintiffs motion for new trial. Defendants filed the appeal before us today, challenging the order granting a new trial. We find the trial court correctly entered summary judgment in the first instance, and reverse the order for new trial.

FACTS

Background

At all relevant times, Renata Howard owned a single-story, commercial building with seven contiguous units or properties located at 2010 to 2036 N. Lincoln Avenue, in Pasadena.[1] The front entry to each property was directly from the public sidewalk. B & B Management Services, Inc. managed Howard's properties. By a lease with a start date of May 15, 2007, Howard rented the property at 2014 N. Lincoln to "Andriea Rodgers d/b/a One World Music." At all relevant times, Scott Alan Murray acted as president of One World Universal Music, Inc., and oversaw the use of the property at 2014 N. Lincoln.[2]

On August 17, 2007, at approximately 11:00 p.m., a gang member shot and killed Ebony H., the minor child of La Tonya Samuels, on the public sidewalk close to 2030 N. Lincoln Avenue. The shooting occurred while a "birthday party" was ongoing inside the property leased by Murray at 2014 N. Lincoln Avenue. The party included security persons and required entrants to make a $5 "donation." The shooter may have been targeting another gang member, believing he had "snitched" on the shooter.

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[1] A motion filed in our court indicates that Howard passed away earlier this year, and that the subject property now may have been placed in the Renata E. Howard Trust, with Clara Dee Thiesmeyer acting as successor trustee. On August 13, 2012, we issued an order granting a motion to substitute Thiesmeyer, as the trust's successor trustee, in place of Renata Howard "for purposes of this appeal." For sake of clarity, we continue to refer to the owner of the subject property as Howard, inasmuch as that is the way the property owner has been addressed throughout this case, both in the trial court and the briefs on appeal.

[2] Hereafter, we collectively refer to the parties related to One World Music as Murray.

The Lawsuit

Samuels, for herself and on behalf of Ebony's estate,[3] filed a civil complaint for damages against Howard and B & B Management Services (B & B).[4] In August 2010, Samuels filed her operative first amended complaint (FAC). Samuels' FAC alleges three causes of action, listed respectively: negligence per se based upon violations of various Pasadena ordinances and codes; premises liability; and wrongful death. Summarized, the FAC alleges that Murray operated "unlawful night club" activities at the rented property at 2014 N. Lincoln, that those activities attracted a violent element, that police warned Howard and B & B that "the situation was a gang shooting waiting to happen," that Howard and B & B took no action to "secure the property" at 2014 N. Lincoln, and that the problems at 2014 N. Lincoln caused the shooting near 2030 N. Lincoln. In the papers submitted in connection with the motion for summary judgment, Samuels basically took the position that Howard and B & B could have and should have evicted Murray before Ebony was shot and killed.

The Motion for Summary Judgment (MSJ)

In December 2010, Howard and B & B Management filed a joint MSJ, or, in the alternative, motion for summary adjudication of issues. The MSJ argued that Howard and B & B "did not owe a duty to prevent crime from occurring on the public sidewalk"; that Howard and B & B did not breach any duty owed under Pasadena's laws to abate the nuisance allegedly caused by the tenant, Murray; and that Howard and B & B did not breach any duty owed to Ebony in failing to prevent improper use of the property at 2014 N. Lincoln by Murray.

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[3] Hereafter, we refer to the plaintiffs collectively as Samuels.

[4] The action also named Murray, but he is not involved in the current appeal, and, accordingly, is not referenced in this opinion except as needed to put the claims between Samuels, Howard, and B & B in context. Samuels initially pursued an action in the local federal district court. The state court action giving rise to the appeal before us day was commenced after the federal court action was concluded. The proceedings in the federal court are not relevant here.

In opposition to the MSJ, Samuels presented evidence showing the following facts: The lease agreement between Howard and Murray provided that the property at 2014 N. Lincoln would be used as an entertainment school and recording studio. The agreement provided that Murray's failure to observe or perform any of the covenants, conditions, or provisions of the agreement would constitute a default or breach and that, in the event of a default or breach, Howard had the right to terminate Murray's lease. The lease required Murray to obtain all licenses, permits, and insurance prior to starting business. The lease required Murray to provide Howard with copies of the insurance and permits, and to demonstrate compliance with zoning ordinances, before starting business.

Within one week of taking possession of the property at 2014 N. Lincoln, Murray held a large party on a Saturday night for underage teenagers. The patrons from the party blocked the public sidewalk in the area, including the entrance to the adjoining property at 2016 N. Lincoln, and blocked the sidewalk, street, and entrance to other nearby offices. The neighbors complained about the party to Brian Lupton, B & B's manager. Lupton talked to Murray. Murray admitted holding a party, explaining that he had a "grand opening" to spread the word about his business. Lupton advised Murray that such events violated the terms of the lease. Lupton also asked the neighbors to notify him in the future if and whenever such a party occurred again so that he could seek police assistance in shutting down the party. The following weekend there was another party. A neighbor called the Pasadena Police Department.

On June 23, 2007, Lupton was notified about a party in progress at the property at 2014 N. Lincoln. Lupton called the Pasadena Police Department to shut down the party. When Lupton arrived at the scene, he saw approximately 200 teenagers in front of the entrance to the property at 2014 N. Lincoln, and the adjoining properties, and blocking the entrance to 2016 N. Lincoln. There were many more teenagers scattered around the streets and sidewalks on both sides of Lincoln, and north and south of Montana Street. Some of the teenagers were drinking and using marijuana.

Police responded to the disturbance call on June 23, 2007, and shut down the party at 2014 N. Lincoln. During that process, officers observed a large numbers of gang members in the crowd near the property at 2014 N. Lincoln, and the adjoining properties owned by Howard. There were alcoholic beverage bottles around the 2104 N. Lincoln property, along with a strong odor of marijuana. The police cited Murray for operating a night club business without a permit.

As a result of the activities at the 2014 N. Lincoln property, the location became known to police as a place where gang members frequented. One police officer told Lupton that the situation in and around the 2014 N. Lincoln area was a "gang shooting waiting to occur." Lupton relayed the officer's warning to Murray, and told him that the safety of his patrons "[w]as on his head." Following the events on June 23, 2007, Lupton warned Murray that he would be evicted if he had any more parties in the 2014 N. Lincoln property.

On June 28, 2007, Lupton notified Murray that Howard was terminating the lease agreement because of violation of the agreement. Lupton specifically told Murray that he was causing a public nuisance, and operating a dance club without the proper permits, security, and fire safety precautions. Lupton threatened to commence eviction proceedings if Murray failed to move out of the property immediately.

On July 1, 2007, Murray held another party at the property at 2014 N. Lincoln. On that occasion, there was an assault with a deadly weapon which police attributed to the activity at the 2014 N. Lincoln property. In late June or early July 2007, Lupton sent Murray a ten day notice to quit.

On July 3, 2007, Lupton advised the Pasadena Police Department that Murray was planning a party for the July 4th weekend, and reiterated that Murray was operating an illegal night club at the 2014 N. Lincoln property. The party during the July 4th weekend was not held as planned, and, on July 6, 2007, Murray indicated that he was willing to move from the 2014 N. Lincoln property. On July 11, 2007, Murray agreed to move out upon receipt of his security deposit to facilitate the move. Lupton did not respond to the request for the funds to move. Murray continued to hold regular "nightclubbing"

activities at the 2014 N. Lincoln property. There were "parties" on July 6, 14, 21, 28, and August 3 and 17, 2007.

Howard, B & B, and Murray knew -- from personal observation and comments by the police -- that gang members congregated in and around the 2014 N. Lincoln property. Lupton was concerned about the gangs, and had specific concerns about the possibility of a gang-related, drive-by shooting occurring in or around the area of the 2014 N. Lincoln property.

On August 3, 2007, Murray submitted inquiries to Pasadena about the permits required to continue his daily operations. On August 6, 2007, Murray applied for a Code Compliance Certificate for the 2014 N. Lincoln property, and for a business license. On August 7, 2007, the City of Pasadena sent a notice to Howard and Murray to abate the activities in and around the 2014 N. Lincoln property. The notice stated they were being given 30 days to stop the activities, and that both the landlord and tenant had an obligation to stop the unlawful activities going on in the property. Murray responded by denying he was carrying out any unlawful activities at the 2014 N. Lincoln property. Howard did not respond to the notice or take any further steps beyond those noted above to evict Murray.

Murray continued occupying the property at 2014 N. Lincoln through August 17, 2007, the day on which Ebony was shot on the sidewalk near the nearby property at 2030 N. Lincoln. Within days after Ebony's shooting, the City of Pasadena filed a lawsuit against Murray to enjoin him from further using the 2014 N. Lincoln property as a night club. On August 27, 2007, a superior court judge issued a temporary restraining order. On September 12, 2007, the trial court entered a judgment on stipulation between the City and Murray, putting in place a permanent injunction barring use of the 2014 N. Lincoln property as a nightclub. At about the same time as the superior court action unfolded, Murray vacated the 2014 N. Lincoln property.

The Trial Court's Rulings and Orders

On March 23, 2011, the trial court granted Howard's and B & B's joint MSJ. Relying largely on *Rosenbaum v. Security Pacific Corp*. (1996) 43 Cal.App.4th 1084

(*Rosenbaum*), the court ruled that neither Howard nor B & B had a duty of care to prevent the shooting that had occurred on a public sidewalk. On April 18, 2011, the court signed and entered a formal order granting the MSJ; on the same day, the trial court signed and entered summary judgment in favor of Howard and B & B.

On May 6, 2011, Samuels filed notice of intent to move for new trial. On June 21, 2011, the trial court granted Samuels motion for new trial. In granting a new trial, the court ruled that, "under the . . . facts of this case, . . . the property owner owed a duty of care to [Ebony] to see that its tenant did not allow dangerous activities presenting a foreseeable risk of harm."

Howard and B & B filed a timely notice of appeal from the order granting new trial.[5]

DISCUSSION

Howard and B & B contend the order for new trial must be reversed because the initial order granting their MSJ "was not erroneous [in that they] did not owe or breach any duty owed to Ebony." We agree on the legal question of duty.

The existence of a legal duty of care is a question of law to be determined by a court. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674.) A ruling that a legal duty exists is "an expression of the sum total of the policy considerations that lead a court to conclude that a particular plaintiff is entitled to protection." (*Jacoves v. United Merchandising Corp*. (1992) 9 Cal.App.4th 88, 114.)

Landowners owe a duty to exercise reasonable care in the use and management of their property. (Civ. Code, § 1714, subd. (a); *Rowland v. Christian* (1968) 69 Cal.2d 108, 119.) In the context of an injury caused by a criminal act by a third party, a landowner's liability is not the result of his or her responsibility to control the conduct of the criminal actor, but on the owner's own failure to act reasonably when there is reason to foresee a probability of injury, and he or she has an opportunity to prevent the injury or warn of the peril, taking into consideration all circumstances, including the nature of the relationship

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[5] The new trial order is appealable. (See *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 858-861.)

between the landowner and the injured party. (See, e.g., *Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715, 719-720 (*Donnell*) [school owed no duty of care to an adult student attacked on sidewalk after leaving the school's premises].)

Ordinarily, a landowner's duty of care in the use and management of his or her property does not extend beyond the boundaries of the landowner's property. (*Medina v. Hillshore Partners* (1995) 40 Cal.App.4th 477, 483-486 (*Medina*) [apartment owner had no duty of care to a person who was injured by gang members who congregated in front of the owner's apartment complex]; *Donnell*, *supra*, 200 Cal.App.3d at pp. 719-720.) As explained in *Rosenbaum*: "California cases which have considered a property owner's duty in the context of injuries occurring off the property have imposed liability only if the harm was foreseeable *and* the owner controlled the site of the injury [citation], or affirmatively created a dangerous condition on the site [citation] . . . ." (*Rosenbaum, supra,* 43 Cal.App.4th at p. 1091.) In the absence of such elements, courts have refused to hold property owners liable for a third party's criminal conduct occurring off the premises. (See e.g. *Martinez v. Pacific Bell* (1990) 225 Cal.App.3d 1557, 1561 [telephone company had no duty to remove public telephone booth, the presence of which attracted a criminal element who injured plaintiff in nearby parking lot].)

Medina, supra, 40 Cal.App.4th 477 is instructive. There, gang members mistook a pedestrian for a member of a rival gang, attacking and killing him as he was walking near an apartment complex owned by the defendants. Plaintiffs alleged the landowners were liable for the killing because they *allowed the gang, which included the landowner's tenants, to congregate in and around the apartment complex,* thereby creating a dangerous condition. Division Six of our court affirmed the judgment in the context of a ruling on a demurrer, holding that the landowner did not owe a duty "to protect members of the public from gang members who congregate around an apartment complex and assault individuals on adjacent public streets." (*Id.* at pp. 480-482.) As *Medina* explained, the "[l]andowner had no duty to police the sidewalk and street in front of the apartment complex." (*Id.* at p. 483.) "A landowner, as a matter of public policy, is not vicariously liable for gang-related assaults that occur on public sidewalks and streets.

We agree that the congregation of gangs poses a foreseeable risk of harm to the public. The instant shooting and death are tragic. Such gang-related homicides are all too frequent. However, the foreseeability of the criminal assault does not compel the ruling that landowners owe a duty to protect the public from gang-related crimes or assume a special relationship with members of the public who use adjacent streets and sidewalks. 'If not . . . concretely linked to a legal relationship the quest for foreseeability is endless because foreseeability, like light, travels indefinitely in a vacuum.' [Citation.] We reject the argument that nuisance theories can be used like a light beam to render a landowner liable for crimes occurring on adjacent streets." (*Id.* at p. 486.)

Other cases support the rule that a landowner has no legal duty to take measures to prevent even foreseeable violence, if it does not actually occur on the property he or she controls. In *Balard v. Bassman Event Security, Inc*. (1989) 210 Cal.App.3d 243 (*Balard*), third parties attacked the plaintiff on a public street outside a bar after the plaintiff left the bar. The security guard/bouncer at the entrance to the bar did not warn the plaintiff of the known danger or chase away her assailants. The court declined to impose a duty on the bar owner to police public areas near, but not on, their premises. (*Id.* at p. 246.) And, in *Donnell, supra,* 200 Cal.App.3d 715, Division One of the Fourth District Court of Appeal declined to impose a duty on a school to protect an adult plaintiff from a criminal assault on the sidewalk bordering the school property. (*Id*. at pp. 719-720.) The common element upon which the courts refused to impose liability on the landowners in cases such as *Medina, Balard,* and *Donnell* was the landowners' lack of control over the public sidewalk area where the criminal act occurred.

It is undisputed that the criminal conduct involved this case, that is, the shooting of Ebony, occurred on the public sidewalk fronting Howard's properties, not actually in any one of Howard's properties. We see no evidence in the papers submitted for-and-against the MSJ showing there are any disputed, triable fact concerning whether or not Howard or B & B "controlled the site" of the shooting. (See *Rosenbaum, supra,* 43 Cal.App.4th at p. 1092.) At most, there is evidence in the record showing that Howard, acting through B & B's manager Lupton, called the Pasadena police for assistance on different occasions

to shut down parties at the property at 2014 N. Lincoln. We are also willing to indulge an inference that Lupton did so to keep the sidewalks and streets in the area clear, so as to placate Howard's other tenants who were complaining about the situation. However, we are unwilling to find that a landowner's acts of calling police for help with a possible criminal situation will create the possibility of liability on the part of the landowner for acts off the landowner's property. Our state's public policy should not deter a property owner from calling the police when there is a possible criminal situation afoot in the surrounding area. On the contrary, our state's public policy should promote such involvement in community life by landowners and the managers of their properties. We find that neither Howard nor B & B assumed any duty of care to persons on the public sidewalk street by calling the police to shut down the parties at the 2014 N. Lincoln property.

This brings us to the question of whether Howard and/or B & B "affirmatively create[d] a dangerous condition" at the site where Ebony was shot. (*Rosenbaum, supra*, 43 Cal.App.4th at p. 1091.) We assume without deciding that a reasonable trier of fact could find Alan Murray, Howard's tenant, affirmatively created a dangerous condition across a wide area surrounding the property at 2014 N. Lincoln by throwing parties that he knew or should have known, by simple observation, attracted gang members to the area. But, there is no evidence in the record upon which a reasonable trier of fact could find that Howard and/or B & B affirmatively created a dangerous condition across the same area. Again, the only affirmative act by Howard and B & B was calling the police. This did not create the dangerous situation on the sidewalk near the property at 2014 N. Lincoln.

This then brings us to the predominant, if not sole, theory for a legal duty in this case. That is, a duty of care based on a landowner's duty to evict a tenant. In *Castaneda v. Olsher* (2007) 41 Cal.4th 1205 (*Castaneda*), our Supreme Court ruled that, depending upon the circumstances, a landlord may have a *duty to evict a gang member tenant* where the tenant's known criminal behavior create such a high level of foreseeability of danger to others that the landlord is obligated to remove the tenant. (*Id*. at pp. 1211, 1219-1222

[duty issue addressed in context of nonsuit].) In *Castaneda*, the landlord owned a mobile home park. The criminal assailant and plaintiff both lived in rented spaces in the park, and the criminal act that injured plaintiff occurred in the park, that is, on the landowner's property. (*Id*. at p. 1210.) The trial court granted a nonsuit; the Supreme Court affirmed.

In finding that nonsuit was proper, the Supreme Court ruled that a landlord does not have a duty "not to rent" to a perceived gang member. The Supreme Court declined to find a duty not to rent because such a duty would have public policy ramifications in possibly denying rental opportunities to person who were not actually dangerous gang members. However, the Supreme Court further ruled that a "duty to evict" might arise once a tenant openly demonstrated he or she was in fact a foreseeably dangerous gang member. (*Castaneda, supra*, at pp. 1216-1222.) The Supreme Court found that the trial evidence in *Castaneda* did not show the possible existence of the duty to evict because the crime involved was not, as a matter of law, highly foreseeable. (*Id*. at p. 1222.)

Here, we find the trial court correctly ruled in its initial order granting the MSJ that neither Howard nor B & B owed a duty of care to Ebony under *Castaneda*. First, there is no evidence in the record tending to show that Murray, Howard's tenant, was himself a dangerous gang member. The duty declared in *Castaneda* is a landlord's duty to evict a foreseeably dangerous gang member. We read nothing in *Castaneda* that leads us to find it should be extended to impose a legal duty on a landlord to evict a non-gang member tenant, a commercial tenant, whose activities attract gang members. Second, even assuming *Castaneda* may be extended to impose a duty on a landlord to evict a gang attracting commercial tenant, we read nothing in the cases that leads us to find that such a duty extends beyond the reaches of the landlord's property boundaries. In other words, even if *Castaneda* is applied here so as to impose a duty on Howard and/or B & B to have initiated an eviction of Murray, any claim arising from the shooting of Ebony would only be viable had Ebony been shot while present on Howard's property. As noted above, Ebony was not shot inside the rented property at 2014 N. Lincoln.

DISPOSITION

The order granting Samuels' motion for new trial is reversed. Each party to bear its own costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.